No. 75-1213

In the Supreme Court of the United States

OCTOBER TERM, 1975

LEWIS CLINTON PIKE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 523 F.2d 734.

JURISDICTION

The judgment of the court of appeals was entered on November 17, 1975. A petition for rehearing or, in the alternative, rehearing *en banc* was denied on December 29, 1975. On January 26, 1976, Mr. Justice Powell extended the time for filing a petition for a writ of certiorari to and including February 27, 1976. The petition was filed on February 26, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there was sufficient evidence to sustain petitioner's conviction.

2. Whether certain testimony should have been excluded as the fruit of an illegal search.

3. Whether testimony concerning petitioner's silence in the face of an accusatory statement by a co-defendant in petitioner's presence was properly admitted into evidence.

4. Whether any of the following contentions, not presented to the court below, requires the reversal of petitioner's conviction.

a. that the disclosure of a government witness's arrest record after the witness had been initially excused but prior to her recall for further testimony precluded effective cross-examination of the witness;

b. that the court's denial of petitioner's motion for a severance denied him a fair trial;

c. that the offense charged in the indictment did not accord with the proof at trial; and

d. that the failure to record side-bar conferences violated the Court Reporters Act as well as petitioner's right to be present at every stage of his trial.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Alabama, petitioner and six co-defendants were convicted of conducting an illegal gambling business, in violation of 18 U.S.C. 1955. Petitioner was sentenced to five years' imprisonment and was fined $20,000. The court of appeals affirmed (Pet. App. 1a-9a).

The evidence at trial established the existence of an extensive lottery in Birmingham, Alabama. Approximately fifty persons took bets in connection with the lottery, turning over their receipts to fourteen "station houses."

The receipts were in turn relayed from the "station houses" to personnel at the lottery "counting house," or headquarters (Tr. 303, 313-317, 353-360, 461-470). Ethel Weatherspoon, a "station house" operator who appeared as a witness for the government, testified that after she had been put in charge of a "station house" petitioner had delivered to her the set of numbered wooden balls used to draw the winning numbers in the lottery (Tr. 311). She also testified that after one set of wooden balls had been seized from her "station house" by the Birmingham police, petitioner gave her a second set (Tr. 312-315). According to Weatherspoon, petitioner frequently came to her house to permit her to draw the winning lottery numbers: "[S]ometimes he would come every week or sometimes once every two weeks * * * " (Tr. 310).

ARGUMENT

1. Petitioner first contends (Pet. 11-18) that the only evidence of his guilt was the testimony of an admitted participant in the lottery, Ethel Weatherspoon, and that such testimony was not sufficient to sustain his conviction because it was not corroborated and because Weatherspoon was "discredited" on cross-examination.

Even if it be assumed that Weatherspoon's testimony concerning petitioner's involvement in the lottery was not corroborated (but see *infra* at pp. 6-8), it does not follow that the evidence was insufficient to support his conviction. Weatherspoon's testimony, if believed, provided direct and unequivocal evidence of petitioner's guilt. Whether her testimony was worthy of belief, or

whether she had been discredited on cross-examination,[1] was a matter properly submitted to the jury with a cautionary instruction concerning the use of "accomplice" testimony.[2] See *United States* v. *Lee,* 506 F.2d 111, 118 (C.A D.C.), certiorari denied, 421 U.S. 1002; *United States* v. *Ross,* 477 F.2d 551, 542 (C.A. 6), certiorari denied *sub nom. Sain* v. *United States,* 414 U.S. 912; *United States* v. *Castro,* 476 F.2d 750, 753 (C.A. 9); *United States* v. *Curry,* 471 F.2d 419, 422 (C.A. 5), certiorari denied *sub nom. Ciraole* v. *United States,* 411 U.S. 967; certiorari denied, 409 U.S. 1006; *United States* v. *Miceli,* 446 F.2d 256, 258 (C.A. 1).[3]

[1]Petitioner contends that Weatherspoon was discredited at trial because of "uncontroverted" evidence that she committed perjury when she denied that she had been promised immunity in exchange for her cooperation with the government. As the Assistant United States Attorney explained, however: "I did tell this witness at the grand jury, and there were other persons appearing at the grand jury, and I did not speak directly to her, but I did tell each of those persons the purpose of the grand jury and the persons [who] testified as to the truth would be granted use * * * immunity. I'm sure that in effect passed over her head. She might not have understood that, and it is apparent from the testimony she did not recall it" (Tr. 361). In any event, whether Weatherspoon had been discredited, as petitioner contends, was a matter appropriately submitted to the jury after having been fully explored in closing arguments (*e.g.,* Tr. 535-537, 543-546, 567-569, 576-578).

[2]The court instructed the jury in relevant part as follows (Tr. 596-597):

> There is a particular instruction I think I should make known to you that relates to your consideration of the testimony of someone who might be labled as an accomplice or a co-actor. Where someone comes into court and describes himself or herself as involved in * * * criminal activity along with one or more of the defendants, and in effect gives testimony that may be damaging to the defendants in the case, then whether we call that person an accomplice or a conspirator or whatever it may be, nevertheless the law says that in considering that testimony, you should do so with great care and caution lest in effect someone be casting off blame and guilt from themselves onto someone else or not telling the complete and whole truth or fabricating or twisting or the like. And in the case of the testimony of Mrs. Weatherspoon, you should consider that with care and caution since according to her testimony she was involved in an illegal operation with one or more of the defendants. So deciding the weight to place on her testimony, consider whether under the circumstances she was telling the truth from this witness stand or whether in some way that didn't represent the truth because of her own involvement and her own situation.

2. Petitioner also contends (Pet. 20-22) that evidence at a pretrial suppression hearing showed that Weatherspoon's discovery by the government resulted from a prior illegal search conducted by members of the Birmingham, Alabama, Police Department and that, as a consequence, she should not have been permitted to testify at his trial.[4]

But petitioner has never asserted a proprietary interest in the premises searched by the Birmingham police or in the physical evidence seized at that time. He concedes

[3]Petitioner's reliance (Pet. 13-15) upon *Keliher* v. *United States,* 193 Fed. 8 (C.A. 1), and *Juhl* v. *United States,* 383 F.2d 1009 (Ct. Cl.), reversed on other grounds *sub nom. United States* v. *Augenblick,* 393 U.S. 348, as evidencing a conflict on this issue is misplaced. In *United States* v. *Miceli, supra,* the Court of Appeals for the First Circuit stated that "[i]t is well settled in this circuit that [the uncorroborated testimony of an admitted accomplice] is sufficient for conviction" (446 F.2d at 258). The passage from the Court of Claims' opinion in *Juhl* v. *United States* quoted by petitioner (Pet. 14-15) construed a provision in the *Manual for Courts-Martial* which prohibited, in specified circumstances, basing a conviction on the uncorroborated testimony of a purported accomplice.

[4]On July 11, 1973, members of the Birmingham Police Department searched a hotel room occupied by several persons believed to be involved in the illegal lottery. The evidence seized during that search, including various lottery paraphernalia, was not introduced during trial because the court held that the affidavit supporting the warrant was insufficient to show probable cause (see Pet. App. 5a).

(Pet. 12), moreover, that he was not present during the search. Petitioner therefore plainly lacks standing to complain that Weatherspoon was discovered as a result of the unlawful search, since it is settled that the rights protected by the exclusionary rule are enforceable only by the individual against whom the unlawful conduct was directed or whose rights were thereby infringed. See, *e.g.*, *Brown* v. *United States*, 411 U.S. 223, 229-230; *Alderman* v. *United States*, 394 U.S. 165, 171-176; *Simmons* v. *United States*, 390 U.S. 377, 389; *Wong Sun* v. *United States*, 371 U.S. 471, 492.

In any event, petitioner's contention that Weatherspoon's discovery by the government resulted from a prior illegal search is without support in the record. Although defense counsel elicited testimony at the pretrial suppression hearing that one or more prospective government witnesses had been discovered as a result of leads developed from the Birmingham police search, the defense did not show that Weatherspoon had been discovered from such leads (see Tr. 28-29). Since petitioner failed to make a *prima facie* showing of taint, the government was not obligated to introduce evidence showing that the discovery of Weatherspoon was attributable to leads developed independent of the unlawful search. See *Nardone* v. *United States*, 308 U.S. 338.

3. As petitioner was leaving a restaurant in Birmingham, he was stopped by an F.B.I. agent and searched pursuant to a search warrant. While the search was being carried out, a co-defendant passed petitioner and stated: "You didn't get away with it after all" (Tr. 369). Petitioner did not respond. The trial court permitted the agent to describe these events to the jury, although it cautioned the jury carefully to weigh the probative value of the testimony before attaching significance to it

(Tr. 370-371, 598-599). Petitioner nevertheless contends (Pet. 24-27) that the court erred in permitting the F.B.I. agent to testify concerning his silence in the face of the statement of his co-defendant.

As this Court observed in *United States* v. *Hale*, 422 U.S. 171, 176, a defendant's "[f]ailure to contest an assertion * * * is considered evidence of acquiescence only if it would have been natural under the circumstances to object to the assertion in question." It would have been natural for petitioner to contest his co-defendant's accusation, and his failure to do so was quite clearly probative. Given the circumstances in which the accusation and petitioner's failure to respond occurred, moreover, the admission of the testimony in question did not offend any of petitioner's constitutional rights. See *Baxter* v. *Palmigiano*, No. 74-1187, decided April 20, 1976, slip op. 10-11.

Unlike the situation in *Hale*, petitioner was not under arrest at the time of the events in question. Although he was being detained and searched when accused by his co-defendant, he was not undergoing custodial interrogation and he had not therefore been informed of his right to refuse to answer official inquiries—nor was there any official inquiry to which he did not respond. Thus, petitioner was not in the situation of an arrestee who had "been advised by government authorities only moments earlier that he has a right to remain silent, and that anything he does say can and will be used against him in court" (422 U.S. at 176) and whose "failure to offer an explanation during the custodial interrogation can as easily be taken to indicate reliance on the right to remain silent as to support an inference that the explanatory testimony was a later fabrication" (*id.* at 177). In short, unlike the situation in *Hale*, the task of identifying the reason for petitioner's failure

to refute the accusation inherent in his co-defendant's statement to him is not compounded by any valid explanations other than culpability. It would have been natural for petitioner to have objected to the statement had he not been involved in the lottery. His failure to do so was thus probative,[5] and testimony concerning his silence was in no sense the result of or tantamount to compulsory self-incrimination.[6]

4. The remaining contentions presented in the petition were not raised by petitioner in the court below and, accordingly, are not properly before this Court. *Adickes* v. *S. H. Kress & Co.* 398 U.S. 144, 147 n. 2; *Lawn* v. *United States,* 355 U.S. 339, 362-363 n. 16. They are, in any event, without merit.

a. Petitioner contends (Pet. 22-24) that delay by the government in disclosing Weatherspoon's criminal convictions prevented the defense from cross-examining her effectively. But even if the government erred in not disclosing Weatherspoon's criminal record prior to the

[5]Petitioner also contends (Pet. 26) that the court erred in permitting the F.B.I. agent to testify concerning the statement made by his co-defendant. The statement was admissible, however, to give meaning to testimony concerning petitioner's failure to respond.

[6]Since petitioner was not undergoing custodial interrogation—and had not therefore been advised in accordance with *Miranda* v. *Arizona,* 384 U.S. 436, when he failed to respond to his co-defendant's statement—this case does not involve the situation presented in *Doyle* v. *Ohio,* No. 75-5014, and *Wood* v. *Ohio,* No. 75-5015 (both cases argued on February 23, 1976). Consequently, we do not believe that the present petition should be held pending a decision in *Doyle* and *Wood.*

beginning of her cross-examination by the defense,[7] that error was cured when the government gave her arrest record to the defense and she was recalled to the stand and cross-examined in light of it (Tr. 445-449).[8]

b. Petitioner and six co-defendants were charged in the indictment with conspiracy as well as with the substantive offense of conducting an illegal gambling business in violation of 18 U.S.C. 1955. Following a pre-trial hearing, the court dismissed the conspiracy count.[9] Petitioner

[7]Petitioner does not attempt to explain why the prosecution had a duty to supply the defense with information that was apparently a matter of public record, and was equally available to the prosecution and the defense. For the reasons explained in our brief in *United States* v. *Agurs,* No. 75-491 (argued April 28, 1976), we do not believe the prosecution had any such duty. There is no occasion in the present case to consider the question of the scope of the prosecution's duty of disclosure, however, since, as noted, the material in question was supplied to the defense and it was fully utilized in cross-examination of Weatherspoon.

[8]Petitioner does not suggest that the delay in informing the defense that Weatherspoon had been convicted previously was the result of conscious wrongdoing by the government, and there is no such evidence in the record.

[9]The court of appeals summarized the trial court's reason for dismissing the conspiracy count as follows (Pet. App. 6a-7a):

> To have left the conspiracy count in the case would have required the United States to establish a starting date of the conspiracy. Judge Pointer's comments from the bench reveal a fear on his part that establishing the starting date posed significant difficulties in avoiding inadvertent references to the illegal search or the products of that search. * * * [T]he dismissal of the conspiracy count hinged on an abundance of caution * * * .

now contends (Pet. 27-30) that the trial court's failure, *sua sponte*, to sever his trial from that of his co-defendants following dismissal of the conspiracy count denied him a fair trial. But petitioner has made no specific allegations of prejudice attributable to his joint trial. Even if petitioner had moved for a separate trial—which, as noted, he did not do—the general considerations advanced by him do not afford a sound basis for departing from the settled rule that if, as here, initial joinder was permissible under Rule 8(b) of the Federal Rules of Criminal Procedure, severance is not required in the absence of a showing of prejudice. See Rule 14, Fed. R. Crim. P.; *Schaffer* v. *United States*, 362 U.S. 511.

c. Petitioner also contends (Pet. 30-32) that the indictment, which charged in the conjunctive several unlawful acts as constituting a violation of 18 U.S.C. 1955, required proof of each of the alleged unlawful acts.[10]. It is settled, however, that where a statute specifies two or more ways in which an offense may be committed, all may be alleged in the conjunctive in one count of the indictment, and proof of any one of the methods is sufficient to sustain a conviction. *E.g., Turner* v. *United States*, 396 U.S. 398, 420; *United States* v. *Jones*, 491 F.2d 1382, 1384 (C.A. 9); *United States* v. *Cioffi*, 487 F.2d 492, 499 (C.A. 2), certiorari denied *sub nom. Cuizio* v. *United States*, 416 U.S. 995; *Gerberding* v. *United States*, 471 F.2d 55, 59 (C.A. 8); *United States* v. *Pauldino*, 443 F.2d 1108, 1112 (C.A. 10), certiorari denied, 404 U.S. 882; *United States* v. *Ippolito*, 438 F.2d 417, 419 (C.A. 5), certiorari denied, 402 U.S. 953.

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[10]The indictment charged that petititoner "did conduct, finance, manage, supervise, direct and own" an illegal gambling business. The trial court instructed the jury that any one of these activities would support a conviction (Tr. 610-611).

d. Finally, petitioner contends (Pet. 32-36) that the court reporter's failure to record nine side-bar conferences between the court and counsel violated the Court Reporters Act (28 U.S.C. 753) and his right to be present at every stage of his trial. But petitioner did not object at trial to the reporting procedures being followed, and he has not pointed to any prejudice resulting from the failure to record the conferences. In these circumstances, we submit that the failure to record the side-bar conferences does not rise to the level of reversible error. *United States* v. *Long*, 419 F.2d 91, 94 (C.A. 5); *Dirring* v. *United States*, 353 F.2d 519, 520 (C.A. 1); see also *United States* v. *Jenkins*, 442 F.2d 429, 438 (C.A. 5); *United States* v. *Sigal*, 341 F.2d 837, 838-839 (C.A. 3).[11]

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY 1976.

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[11]Petitioner's reliance upon *Casalman* v. *Upchurch*, 386 F.2d 813 (C.A. 5) and *Edwards* v. *United States*, 374 F.2d 24 (C.A. 10), is misplaced. In *Casalman*, a civil case in which counsels' closing arguments were not reported, the court of appeals affirmed the judgment of the trial court because of the absence of a showing of consequent prejudice. In *Edwards*, the court of appeals held that failure to comply with the Court Reporters Act was not prejudicial error *per se* and affirmed the appellant's conviction since no prejudice had been shown.

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